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IN THE

Supreme Court of the United States

No. 78-1360

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA.

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counter-Statement of Jurisdiction

It is the contention of the respondent Weiss Bros. Leasing, Inc. that the jurisdiction of the Supreme Court of the United States cannot be invoked under the United States Code, Title 28, Section 1257 (3), as contended by Petitioner Fiore, for the reason that no valid Federal or Constitutional question is involved, and for the further reason that Petitioner failed to raise a Federal or Constitutional issue before any of the State Courts hearing this case below.

Counter-Statement of the Case

Respondent Weiss Bros. Leasing, Inc. adopts Petitioner's statement of the case with the following corrections of inaccurate statements or omissions:

The evidence clearly indicates that Weiss Bros. Leasing, Inc. of McKeesport, Pennsylvania was the highest and best bidder in response to the advertisement of the County Commissioners soliciting bids. Weiss Bros. Leasing, Inc. by bid provided for payment of $5.27 per ton of coal mined, or 13.17% of the sale price of the coal. There were eight other bids submitted, the next highest being that of the Petitioner, Fred Fiore Coal Company, which provided for payment of $5.11 per ton, or 21% of the sale price of the coal. The testimony is just as clear that the County Commissioners when they made their award on April 24, 1975 to Weiss Bros. Leasing, Inc. were making an award to the highest and best bidder in response to the advertisement soliciting bids. Their then Chief Solicitor, H. Reginald Belden, Jr., testified that he felt the award made on that date was an award to Weiss Bros. Leasing, Inc. for the leasing of coal. He, pursuant to his instructions from the County Commissioners, specifically requested Weiss Bros. Leasing, Inc. to submit a Proposed Lease to the County Commissioners which Lease was prepared and submitted by Weiss Bros. Leasing Inc. to the Westmoreland County Board of Commissioners. Mr. Belden also testified that he felt the award made on July 24, 1975 to Fred Fiore Coal Company was also an award to enter into a lease agreement for the coal on the Westmoreland County property.

The Record of the hearing held by the Westmoreland County Courts on April 1, 1977 and June 17, 1977 discloses considerable evidence of irregularities by the Board of County Commissioners in their attempts to have

the coal removed by a responsible contractor and proper royalty payments made to the County of Westmoreland. The awarding by the County Commissioners on April 24, 1975 to Weiss Bros. Leasing, Inc., the making of an award to Fred Fiore Coal Company on July 24, 1975, the action of the Board of County Commissioners on October 9, 1975 authorizing the County Solicitor to petition the Court to lease the rights of the coal on the Westmoreland Manor property to Weiss Bros. Leasing, Inc., the action of the Westmoreland County Commissioners on December 31, 1975 advising the County Solicitor to withdraw the petitions to the Court of Common Pleas of Westmoreland County and the Commonwealth Court of Pennsylvania requesting approval for strip-mining of the coal on Westmoreland property in regard to both the petitions of Weiss Bros. Leasing, Inc. and Fred Fiore Coal Company, and the attempt of the County Commissioners to award to the petitioner Fiore a lease for a royalty payment which differed from the actual bid submitted by Fred Fiore Coal Company which was $5.11 per ton rather than ". . . no less than $5.27 per ton . . ." as was set forth in the petition submitted to the Westmoreland County Court *en Banc*.

With the exception of the Board of County Commissioner's action on April 24, 1975, none of the above actions of the County Commissioners conforms with the law on normal bidding procedures. The respondent Weiss Bros. Leasing, Inc. does not agree with petitioner that the Federal issues asserted in Fiore's Petition for Certiorari were raised in the Courts below. Nowhere in the briefs or oral arguments before the Courts below were any such issues raised.

Statement of Questions

I. Were there any abuses of discretion by the Pennsylvania Courts in refusing to approve the lease to Fred Fiore Coal Company, which raised any Federal questions recognized by this Court?

II. Did the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth and Supreme Courts of Pennsylvania, acting within its statutory discretion in refusing to approve a lease between the respondent Westmoreland County and Petitioner Fiore for mining coal on County property where there were irregularities in the bidding process and in the awarding of the proposed lease, violate any Federal statutory or Constitutional mandates?

Reasons for Refusing Petitioner's Writ

I. We submit that Petitioner failed to comply with the requirements of this Court's Rule 23 (f) (U.S. Sup. Ct. Rule 23 (f), 28 USCA). Rule 23 (f) requires that in a Petition for Certiorari, Petitioners state the stage of the proceedings at which it raised a Federal question, the specific method and manner in which it raised the question and the way the Lower Courts passed on the question. The Petitioner is required to set forth in its petition the specific quotations from the Record that would establish that Petitioner previously raised the question in a timely and proper fashion so that this Court shall have jurisdiction. Although the Petition asserts that Petitioner did raise the Federal question throughout the proceedings in Pennsylvania Courts, no specific reference is made as to where in the Record these questions were raised and the action of the Pennsylvania Courts in regard to the questions. If, as Petitioner would have us believe, these issues

had been raised in the Pennsylvania Courts, certainly said Courts would have discussed the questions in their respective Opinions. These Opinions are void as to any Federal questions.

This Court has held that the assertion of a Federal claim must be made clearly and not left to mere inference. *Thomas v. Iowa*, 209 U.S. 258, 52 L.Ed 782, 28 S. Ct. 487 (1908); *Mutual Life Insurance Company of New York v. McGrew*, 188 U.S. 291, 309-310, 47 L.Ed. 480, 485, 23 S. Ct. 375 (1903).

We respectfully submit that Petitioner cannot at this point raise Federal questions which they failed to present in the Courts below.

II. The arguments of the Petitioner that the Pennsylvania Courts are limited in their review powers do not have merit. The Act of August 9, 1955, P.L. 323, Section 2306 (16 P.S. Section 306) specifically directs that the Courts should conduct a hearing and ". . .make such order and decree as shall seem right and proper. . . .". Judge Rodgers in his Opinion for the Pennsylvania Commonwealth Court in regard to this case cited decisions of the Supreme Court of Pennsylvania as follows:

> "It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. *Parker vs. Philadelphia*, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960). *However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well.* See *Baton Coal Company Appeal*, 365 Pa. 519, 76 A.2d 194 (1950), and *McKees*

Rocks Borough School District Petition, 360 Pa. 285, 62 A.2d 20 (1948). 25 Pa. Commonwealth Ct. at 534, 360 A.2d at 851." (emphasis added).

It is obvious from their Opinions that Judge Rodgers for the Commonwealth Court and Judge McCormick for the Court of Common Pleas of Westmoreland County were appalled at the inconsistencies and irregularities which took place in the attempts to have a lease agreement entered into for the coal property of Westmoreland County. Judge McCormick, speaking for the Westmoreland County Court *en Banc* stated:

> "The Court cannot in good conscience recognize the action of the Board of Commissioners of Westmoreland County on July 24, 1975 as being valid and disregard the actions of the Board of County Commissioners on April 24, October 9 and December 31, 1975. To do so would amount to the Court substituting its discretion for that of the County Commissioners on the action taken by the Commissioners on all of the dates with the exception of July 24, 1975. It is the opinion of this Court that the various actions of the Board of County Commissioners, i.e. on April 24, 1975, July 24, 1975, October 9, 1975 and December 31, 1975 were not consistent with each other nor are they consistent with the Petition and proposed agreement now before the Court."

For the Court *en Banc* of Westmoreland County to act differently from the manner in which it did would constitute a gross abuse of discretion under all of the circumstances before it.

A review of the Record of the hearing before the Court *en Banc* of Westmoreland County clearly indicates the Commissioners' intention to enter into a lease agreement for the stripping and mining of the coal on the Westmoreland County property with Weiss Bros. Leasing, Inc. Weiss Bros. Leasing,

Inc. was the highest bidder and was instructed by the County Solicitor to prepare a lease agreement, which was done. In addition, Weiss Bros. Leasing, Inc. applied for and was issued a mining permit for the subject coal property by the Pennsylvania Department of Environmental Resources. This could not have been done without the compliance by the Board of County Commissioners with certain rule requirements of the Department of Environmental Resources.

The Pennsylvania Supreme Court in the case of *Pearlman v. Pittsburgh, et al.*, 304 Pa. 25, p. 25 speaking generally as to the concept, stated:

> ". . .it is a novel proposition that the bid of a perfectly responsible party can be ignored. . . .the statute requires that contracts be awarded to the lowest responsible bidder and the Courts hold it is for the municipal authorities to exercise a sound discretion to determine who is such. . . ."

The opinion set forth in the Pearlman case was supported in an Opinion by Mr. Justice Kephard speaking for the Court in *Hibbs v. Aresnberg*, 276 Pa. 24, p. 29 when the Court said:

> ". . .though the Directors were not bound in law to give the contract to the lowest bidder, who might be irresponsible, they were bound to investigate, and if a bidder measured up to the law's requirement as a responsible party, the Board could not capriciously award the contract to another. . . ."

The County Commissioners in the present case did not give notice to Weiss Bros. Leasing, Inc. to whom they had already made an award nor to any other party in interest of the award to the Petitioner Fiore. It is obvious that subsequent to the award by the County Commissioners on April 24, 1975, the Commissioners and Fiore entered into private negotiations out of which the action of the Board of Commissioners on July 24, 1975 emerged.

In the instant case, pursuant to a newspaper advertisement, nine bids were received by the Controller of Westmoreland County. Among others Fred Fiore Coal Company submitted a bid based upon the tonnage of coal removed at the rate of $5.11 per ton. The bid of Weiss Bros. Leasing, Inc. based on the tonnage of coal removed was $5.27 per ton. Both of these bids were dated March 18, 1975 and were opened by the County Commissioners on that date. On April 24, 1975 the bid of Weiss Bros. Leasing, Inc. was accepted. On July 24, 1975 the County Commissioners made an award to Fiore Coal Company at a price which was different from the actual bid submitted by Fiore. On October 9, 1975 the County Commissioners authorized the County Solicitor to petition the Court *en Banc* to approve a coal lease to Weiss Bros. Leasing, Inc. On December 31, 1975 the County Commissioners instructed the County Solicitor to withdraw the petitions for approval of lease agreements to the Court of Common Pleas of Westmoreland County. All of these actions by the Board of County Commissioners were inconsistent with each other. The Court *en Banc* of Westmoreland County obviously agrees that there were considerable inconsistencies and irregularities throughout this matter and therefore disapproved the Petition accordingly. The Commonwealth Court of Pennsylvania also agreed with the Westmoreland County Court *en Banc*. Judge Rodgers of the Commonwealth Court stated in his Opinion that the Lower Court had ". . .exercised a sound discretion in refusing to approve the proposed lease to Fiore".

Conclusion

Respondent Weiss Bros. Leasing, Inc. respectfully submits that there are no Federal questions involved in this matter. There is no unconstitutional impairment of contract between Fiore and Westmoreland County Commissioners. Under the statute here before the Court, there is no contract until a contract or lease is submitted to the Court for approval and is approved by the Court. Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, 16 P.S. 2306.

It is further submitted that the Petitioner fails to raise any issues which constitute Federal Questions at any stage of this case and therefore is precluded from raising them before this Court. There is no evidence that the Pennsylvania Courts exercised anything but sound discretion in refusing to approve the coal lease submitted since there were numerous inconsistencies and irregularities in the procedures followed by the County Commissioners and Fred Fiore Coal Company. For these reasons, the Petition of Fred Fiore should be denied.

Respectfully submitted,

THOMAS ANTON,
Attorney for Respondent—
Weiss Brothers Leasing, Inc.